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Chair

Mr. James Bezan

Standing Committee on National Defence

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● (1535)

[*English*]

The Chair (Mr. James Bezan (Selkirk—Interlake, CPC)): Good afternoon, everyone.

We are going to continue our study of Bill C-15 pursuant to the standing order issued to us as an order of reference on Wednesday, December 12, which was to study the Act to amend the National Defence Act and to make consequential amendments to other Acts. We are going into clause-by-clause consideration pursuant to Standing Order 75(1).

In light of that standing order, we're going to postpone the consideration of clause 1 and move straight into clause 2, which provides definitions. Are there any comments? Shall clause 2 carry?

(Clause 2 agreed to)

The Chair: Shall clause 3 carry?

(Clause 3 agreed to)

(On clause 4)

The Chair: We have an NDP amendment.

Mr. Harris.

Mr. Jack Harris (St. John's East, NDP): I move amendment NDP-1, which would delete lines 11 to 23 on page 4 of the bill.

We propose removing these proposed subsections as they're unnecessary. We don't have to have special provisions for the Chief of the Defence Staff to be able to remove the provost marshal. We don't believe that's an appropriate way to have the provost marshal, who is the equivalent of a chief of police, as we discussed during committee. The provost marshal ought to have an independent existence. Having the Chief of the Defence Staff able to remove him interferes with the independence of the provost marshal, which we think is important. The current lack of independence is made worse, in the view of some of the witnesses we had.

If this amendment is not supported, we have a different amendment. The principle was to remove not only the provision requiring the provost marshal to be subject to serve at good behaviour, but also especially those provisions allowing the Vice CDS to make instructions or issue guidelines to the provost marshal.

We had considerable debate about that during the hearings. Obviously, opinions differ on this. I think Mr. Peter Tinsley expressed it very well as a step backwards. We don't see any justification for changing the particular situation whereby the provost marshal is in charge of the investigation, can lay the charges, can do the investigation. We had some debate with Mr. Tinsley from members of the committee suggesting there were instances, especially during combat or in the field, where the judgment of the provost marshal should be overruled by the Vice CDS. I believe the response was a practical one and a sensible one from Mr. Tinsley, which is that for people in that position—and he has been in that position as a police officer both in the field and elsewhere—the fact that there are combat circumstances doesn't make a difference. The importance of the independence of the police is still relevant despite the fact that it is taking place in combat.

We obviously recognize there's a chain of command here, but in the case of the military police, the independence of the police force is similar to the need for the independence of the judiciary, which we see in the military, which we should see in the military, which we should also see in civilian life. To make the provost marshal subject to this provision is a step backwards, as was said. It also goes against the recommendations made in the Lamer and LeSage reports, and it is also contrary to the accountability framework that's been agreed upon.

It's been suggested that's just a policy and can be overruled. It may well be just the policy, but this is now being overruled by legislation, which amounts to a step backwards. Why this is necessary hasn't been adequately or convincingly or persuasively presented to the committee. Therefore, we want to see this change.

The Chair: Okay.

Are there other comments?

Mr. Alexander.

Mr. Chris Alexander (Ajax—Pickering, CPC): Thank you, Chair.

As you might have predicted, on our side we have an entirely different view. The measures contained in this amendment would remove from Bill C-15 a very important provision that is very much in the spirit of the military justice system and in the spirit of modernizing that system. It is a complement—complement with two Es—to the mandate and role of the provost marshal, which is being given legislative form here in an unprecedented way elsewhere in the bill.

This part of this clause explicitly shows the need, and enshrines the need, for the manner in which the military justice system, as it relates to the provost marshal, has to balance the interests of justice with those of military operations. And as both the provost marshal said as a witness here, and the VCDS said here, this is not a challenge to the independence or the professionalism with which the provost marshal and the military police will conduct investigations. It is a recognition that they will have to conduct investigations from time to time in extraordinary circumstances, on a battlefield in a dynamic environment, an unprecedented environment, where we've sent the Canadian Forces because they have the capabilities to operate there, and where the duty of care that we all have towards the Canadian Forces requires that there be an operational point of contact, in this case one point of contact, with the police. This point of contact would allow the chain of command to inform the provost marshal or indeed instruct the provost marshal if necessary with regard to certain circumstances that might affect an investigation.

That enhancement of accountability in the spirit of the military justice system also contains a transparency provision set out in 18.4 and 18.5 that will ensure that this VCDS and his successors are true to the spirit and letter of their commitment, which is to use this provision rarely and to use it to shore up the independence of investigations, not to compromise them in any way.

● (1540)

The Chair: Mr. McKay.

Hon. John McKay (Scarborough—Guildwood, Lib.): I associate myself with Mr. Harris' comments. It is incumbent upon the government to show an overwhelming basis for the justification for potential interference in any kind of police investigation. The burden is entirely on the government to justify this, and in my mind, they have not done that. In fact, the evidence has been to the contrary by former and current provost marshals, and I take this as a step backwards. I can virtually guarantee that this will be challenged at some point or another in circumstances that will not be favourable to the government, and therefore will compromise a proper investigation and possibly even proper convictions.

So I don't think the government has met the burden of proof, and as I say, if it ain't broke, don't fix it.

The Chair: Mr. Harris.

Mr. Jack Harris: There are three things that were said opposite that disturbed me. One suggested that we have to balance the interests of justice with operations. I don't think that's a balancing act this legislation is doing and neither do I think we balance the interests of justice with operations, we find a way to achieve justice despite operational circumstances.

When you look at this issue here, if it is a step backwards—which we know it is because there's already an agreement now between the provost marshal and the Vice Chief of the Defence Staff that it operates in the spirit of independence—stepping backwards is not modernizing a rule. If we're going to modernize military justice, we'd listen to what Justice Létourneau said when he talked about the modernization of the military justice system that's taken place in Australia, in the U.K., in New Zealand, and in other parts of the world that have recognized some of the arcane aspects—some of them are a century old—of military justice.

The modernization of the military justice system would actually make it more like the civilian system. The aspects that are unnecessary in the military context should be removed. Clearly that had been undertaken in Canada through one of the recommendations of Justice Lamer and the follow-through by the agreement and guidelines that had already been agreed upon. We're not modernizing it, we're going backwards. That's absolutely wrong.

The government has put forth not one single incident, not one single circumstance, not one single example where a provision like this was necessary and unfortunately was not available—not one. On the other hand, there have been two incidents discussed, which were in combat—one was in Somalia and one in Afghanistan—where in fact the opportunities to interfere were present. They weren't used, thankfully.

One required significant independence. In the Somalia situation, where in the absence of a senior military police officer the local command was conducting an investigation, which was entirely inappropriate, the military police had to stop it. We all know the fallout from this incident in Somalia led to significant harm to the institution of the Canadian military, as a result of what happened and the outcome.

The other incident had to do with the removal of a commanding officer in Afghanistan. When Mr. Hawn and I were both there on a Sunday morning, all of a sudden there was a plane leaving Kandahar air force base with a commanding officer on it because of a matter involving an offence and a charge against the code of military conduct. That's an incident where one might say there could have been interference. There were guidelines in place. There was an agreement in place. No interference took place.

Are we opening the door for potential interference in a circumstance like that? That's the concern we have. Why are we stepping backwards? This is not modernization. This is retrenchment. This is turning back the clock.

● (1545)

The Chair: Are there other comments? Seeing none, I'm going to put the question.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Then we move to amendment NDP-2. I'm ruling it out of order. It's inadmissible because it goes beyond the scope of the bill.

Let me read my ruling first. It's inadmissible because there is already a hierarchy link between the Chief of the Defence Staff—in clause 4 here, in proposed subsection 18.5(1), it talks about how "The Provost Marshal acts under the general supervision of the Vice Chief of the Defence Staff".

Here in the amendment you're making, it also links in the independence by providing guidance to the Military Police Complaints Commission, so I'm ruling this one inadmissible.

Mr. Jack Harris: That's the copy of the guidelines to the Military Police Complaints Commission.

The Chair: "...issue instructions or guidelines", you are issuing instructions from the Chief of the Defence Staff through the vice chief directly to the military police commission, which is outside the scope of this bill.

So it's out of order—inadmissible.

Mr. Jack Harris: It may be inadmissible by virtue of the ruling, Mr. Chairman, but the purpose is to ensure that any instructions given in writing are in fact made available to an outside body, such as the Military Police Complaints Commission.

It appears it has been interpreted that the instructions are to be given—

The Chair: Yes, it has.

Mr. Jack Harris: But that's not the intention.

● (1550)

The Chair: That's a drafting problem then. The way it is, it's not admissible, so it's not going to be debated.

We move on to clause 4 without amendment.

(Clause 4 agreed to on division)

(On clause 5)

The Chair: Are there any comments?

Mr. Harris.

Mr. Jack Harris: I have a comment.

We certainly support that because we would like to see the military judges independent of the grievance system in respect to their duties. We'll have other comments on what happens to grievances submitted by military judges, but obviously the judicial duties should be handled by judicial counsel and the judges themselves. So we will support that.

The Chair: Okay.

(Clause 5 agreed to)

(On clause 6)

The Chair: Mr. Harris, could you move your amendment NDP-3 to the floor, please?

Mr. Jack Harris: This has to do with the role of the grievances submitted by the....

It is replacing lines 40 and 41, on page 4.

The Chair: The very last two lines.

Mr. Jack Harris: This is to deal with what happens to grievances that are submitted by military judges. It is our firm belief that this aspect of the grievance system relates to the independence of military judges.

We just had a provision, in clause 5, saying that military judges can't submit grievances in matters related to their judicial duties. Then, in clause 6, they can submit grievances but the determination and consideration by the Chief of the Defence Staff interferes with their independence. Even though it's a non-judicial matter, it may have to do with vacation pay, with entitlement for leave, with something related to pay, and it could have an influence on the amount of money a military judge is to receive in terms of the result of a grievance. As was indicated to the committee by the grievance board chair, the vast majority of grievances that come before the board have to do with benefits, so there's likely a monetary consequence to this.

The idea of the amendment is to ensure the grievances committee has the final decision with respect to that. The amendment says the grievances shall be "considered and determined by the Grievances Committee", which is the new name for it, by the way. "The committee's decision is final and binding and, except for judicial review under the Federal Courts Act, is not subject to appeal or review by any court."

That provides a separate avenue of resolution of grievances by military judges. I would submit it's a factor that would or could be considered by a court in considering whether military judges are indeed independent. We've seen a couple of cases now where the courts have ruled that the independence of judges was compromised. This is one where there is also a danger of that kind of ruling from the courts, and we think this amendment would resolve that. There's no need for the Chief of the Defence Staff to hear this if we have a robust grievances committee that's able to determine these matters.

The Chair: Mr. Alexander.

Mr. Chris Alexander: Thanks, Chair.

Under section 29.11, the Chief of the Defence Staff is the final authority in the grievance process. This proposed amendment would derogate from that principle by placing the grievances committee in....

The Chair: You are ahead one.

Mr. Chris Alexander: No. I'm making a point about the amendment by placing the grievances committee in the position of the CDS as final authority for the resolution of grievances for the purposes of military justice. That would be an inconsistency in the legislation. We therefore consider it entirely inappropriate.

The military judges do have absolute independence, and that independence is robustly protected throughout the act insofar as they are adjudicating legal cases. Insofar as they file grievances, which to my understanding has never occurred, the number of military judges being very limited, they would be subject to the grievance process. No amendment has been proposed to the final authority under this proposed legislation, not to make the Chief of the Defence Staff anything other than the final authority in the grievance process under section 29.11.

● (1555)

The Chair: And you are correct. Based on that, it was an oversight by me and at the front table.

Since we have started the debate, we'll finish it.

Go ahead.

Mr. Jack Harris: This suggestion being made suggests it is inconsistent with other parts of the act. The next amendment, NDP-4, amends section 29.11 and says "Except in the case of a grievance considered and determined by the Grievances Committee, the Chief of the Defence Staff is the".

These two amendments go together. They are numbered separately, but their going together would establish the Grievances Committee.

We had to do one first. We could combine them as one amendment, but the fact of the matter is NDP-3, which deals with section 29.101, and NDP-4, which deals with the consequences of section 29.11...so that's a consequential amendment to the first one.

I would submit that.

The Chair: I've been advised that proposed section 29.11 has already been determined to be inadmissible, and based upon the linkage you just made as well as the comment made by Mr. Alexander that NDP-3, the amendment to clause 6, section 29.101, of the National Defence Act is also outside of the scope of the bill since the Chief of the Defence Staff is the final authority for all grievances and not only some of them.

You can't replace the Chief of the Defence Staff with the grievances committee since that would be contradictory to the bill, so I'm ruling it inadmissible.

Mr. Jack Harris: Is it contradictory to the bill or outside the scope of the bill because the scope of the bill deals with the powers of the Chief of the Defence Staff, and we're amending the powers of the Chief of the Defence Staff by saying that...?

The Chair: But you're replacing him as the authority here. You're making it so that the grievances committee is replacing the Chief of the Defence Staff.

Mr. Jack Harris: In the case of military judges....

The Chair: No. It's against the principle of the bill.

Mr. Jack Harris: So the principle of the bill is regardless of whether it's unconstitutional or it will be ruled unconstitutional that we can't amend it to fix it.

The Chair: That's not our place at this level. There is the scope and purpose and principle of the bill that's before us, and this changes that dramatically so I'm ruling it inadmissible. That same logic applies to NDP-4.

Mr. Jack Harris: I'm looking at the numbers, Chair. I don't know if a motion to overrule the chair is in order. It might be in order, but it may not be....

The Chair: If you want, I'll read it right now.

“Decisions by the Chair are not debatable.” See page 1049, chapter 20 of O'Brien and Bosc, our rules and procedures that govern us as a committee and as members of Parliament. You can appeal to the full committee. If you are appealing to the committee that you don't agree with the decision of the chair, then I'm going to ask that the decision of the chair be sustained: that this amendment is inadmissible.

All those in favour?

Mr. Jack Harris: There's no appeal to the chair. I'm not seeing any nods over on the other side.

The Chair: Okay. My ruling stands.

NDP-3 and NDP-4 on those same points I just made are ruled out of order.

We're back on clause 6, unamended.

Mr. Jack Harris: No, sir, there's another amendment, NDP-5.

The Chair: Amendment NDP-5 first. Okay, so we're at amendment NDP-5.

Mr. Jack Harris: I'd like to move amendment NDP-5.

Mr. Chris Alexander: Chair, I have a point of order.

Could you give the longer number, because I think they're reversed in some?

The Chair: Okay.

Amendment NDP-5 is reference number 5944209. I know this package was just circulated.

Mr. Jack Harris: Yes, we're all scrambling a little bit, so I hope the chair will have some patience on that—

The Chair: Okay, I do. So we're at amendment NDP-5.

Mr. Jack Harris: —and we'll have patience with the chair.

So amendment NDP-5—

The Chair: It's in order, so if you want to move it to the floor, go ahead.

● (1600)

Mr. Jack Harris: This one is in order, that's good to hear.

The Chair: Yes.

I think in the last committee it was ruled out of order, but I'm ruling it in order. That one was a part of Bill C-41.

Mr. Jack Harris: So amendment NDP-6 changes—

The Chair: Amendment NDP-5—

Mr. Jack Harris: Amendment NDP-5 amends clause 6—

The Chair: Clause 6, section 29.11.

Mr. Jack Harris: — page 5, replacing line 3. This involves the insertion of a few words. We have reorganized it slightly by saying the Chief of the Defence Staff is the final authority in the grievance process and shall:

> (a) decide all matters relating to a grievance, including financial matters; and
>
> (b) deal with all matters as informally and expeditiously as the circumstances and the considerations of fairness permit.

It's essentially putting in an extra possibility, an extra qualification to the decision-making, and saying he should have the power to include financial matters.

Mr. Chair, I will speak in favour of that.

I think we've been through this before. We've had representations to the committee going back to the consideration of Bill C-41. We had multiple considerations. We've had complaints made to the grievances committee. We've had a series of complaints to the ombudsman, who has been here before us. We've had the grievances committee chair speak to this. We've had publicity nationally, particularly recently, on the home equity assistance program, where the CDS ruled favourably for a particular grievance but no financial award has taken place.

We've also had an attempt to resolve the matter by creating an order in council—that was done last June, although without any publicity until recently—that allows for *ex gratia* payments. We've had some comment on that by Mr. Hamel, from the grievance board. He explained, in a rather convoluted and complicated way, that *ex gratia* payments apply if you're not entitled to something, but if you are entitled to it, they don't, and you can't change the rules to give an *ex gratia* payment, or some such interpretation as that. That seems somewhat complicated.

It appears the *ex gratia* payment order that was passed last June by cabinet has not resulted in anybody receiving any money and doesn't seem to solve the problem. The simple solution is an amendment to this legislation that establishes that the Chief of the Defence Staff can make a decision in terms of financial matters.

Again, we're under the circumstances where a huge number, if not the majority, of grievances that go before the board are about matters of benefits. Are you entitled to an allowance for moving? Are you entitled to an extra holiday? Are you entitled to payment for work you did that was over and above the expectations on a particular occasion?

All of these things are not necessarily horribly complicated. What happens, though—as the evidence we heard the last time showed, and Mr. Hawn will remember—is that if a grievance is approved, then it goes to the lawyers within the Department of Defence to decide whether a person has a claim against the crown in law. That's a very different set of circumstances than having a grievance whereby someone says, “Yes, you're entitled to an extra $1500”, or “Under travel policy *xyz*, you're entitled to that $800 as part of your moving expenses.”

Why don't we want the Chief of the Defence Staff to have the final authority? As my colleague Mr. Alexander so adamantly said, this is the intention of the act. The final authority has to be the Chief of the Defence Staff. Well, if that's true, let's give him the authority. Let's say he can order that somebody is entitled to receive the $2500 he won his grievance on, and then somebody writes a cheque.

We're talking about the Chief of the Defence Staff here. We're not talking about a clerk in a remote location having the keys to the treasury. We're talking about the Chief of the Defence Staff. If a grievance proceeds after significant consideration all the way through the grievance procedure, some of which takes a long period of time and involves many reviews, in some cases, for policy considerations, and it ends up on the desk of the Chief of the Defence Staff, surely the Chief of the Defence Staff can be allowed to decide whether a soldier who should be receiving a benefit is going to get it or not.

● (1605)

We had all kinds of arguments last time about other...in fact it was ruled out of order.

It's not out of order now, so members of the committee can feel free to give the Chief of the Defence Staff authority in this matter. I urge them. We hear all this talk about supporting our troops and supporting our soldiers, but when we've got people complaining about such simple matters that have to do with their personal financial circumstances, their family circumstances, morale is at risk. We've got people complaining all the time about the length of the grievance procedure, which is one thing. Some moves have been made to try to fix that. Fair enough, that's been done to some extent but not to everybody's satisfaction.

The issue of getting paid when you win your grievance should be a simple matter. I think every other organization of the country manages.... If they have a collective agreement for example, and they win a grievance, they get their money. If they have a system that isn't unionized, people don't have the right to have a union, a collective bargaining arrangement.

But they have a system that's supposed to provide them with an adjudication of any grievances that they have and it should provide them with a cheque if they win. Whether it's $50 or $500 or $2500, and most of these things involve a small amount of money, in terms of the satisfaction of the soldier who wins a grievance, and then is told they have to wait until some lawyer they don't necessarily have any contact with decides whether it's appropriate or whether they actually have a claim against the crown in law, which is not part of the grievance at all, the soldier shouldn't have to deal with it.

When I say soldier, I mean soldiers, and sailors, and airmen, and women and all of that. We're just using the generic here. This is unfair to the men and women who work for the Canadian Forces to be in a situation where they win a grievance and they don't get paid.

The Chair: Okay.

Mr. McKay.

Hon. John McKay: I want to agree with the amendment, but I'm not convinced that it actually does what Mr. Harris would like it to do. It is a bizarre situation where the CDS can actually rule that soldier XYZ is entitled to money. So if I may direct a question to the officials, the question is: does Mr. Harris' amendment actually expand the authority of the CDS in any way?

If it does expand the authority of the CDS in any way to deal with this kind of grievance over what he's traditionally been doing, does it entail any capacity on the part of the CDS to actually settle the grievance then and there by writing a compensating cheque?

How would this amendment, if it were to succeed, actually obviate the Treasury Board guideline?

The Chair: Okay. I want everyone to know that we're being joined again today by Colonel Gibson, Lieutenant-Colonel Dufour, and Lieutenant-Colonel Strickey from the JAG. They're here strictly from a technical standpoint to assist.

So can you make sure that your commentary is to the technical aspects, Colonel Gibson, as they relate to the question from Mr. McKay.

Colonel Michael R. Gibson (Deputy Judge Advocate General of Military Justice, Office of the Judge Advocate General, Department of National Defence): Thank you, Mr. Chair. I would say two things. The first is that somewhat regrettably we're not the individuals who are best placed to actually speak to this particular issue because the policy responsibility with respect to this issue actually falls under the Vice Chief of the Defence Staff as opposed to the JAG. Secondly, as the DJAG Military Justice, I don't advise in this particular area. So I would just like to give that as a caveat. But a very short answer within the bounds of what I feel competent to give would be this. I think there would be concerns that the amendment would actually accomplish what it was intended to do in terms of providing the requisite financial authority and I think one would likely have to have regard to other acts as well, for example the Financial Administration Act. I think that's about the extent of what I can responsibly say to the question, Mr. Chair.

● (1610)

The Chair: Thank you.

Are you done, Mr. McKay?

Okay I have Mr. Alexander and I'll come back to Mr. Harris.

Mr. Chris Alexander: Very briefly, Chair, we oppose the amendment. The financial authority of the CDS has been strengthened by order in council last June, and that is having an effect. The backlog in grievances is also being dealt with even before the further improvements provided for in Bill C-15 as unamended, come into force.

Finally, we're of the strong view that the best place to enhance financial authorities is not in the National Defence Act, it is in the Financial Administration Act, other acts of Parliament governing financial matters, and above all, in the policies and programs that are the province of the Treasury Board.

The Chair: Okay.

Mr. Harris.

Mr. Jack Harris: Accepting Colonel Gibson's caveat on his views that this is not intended to amend the Financial Administration Act, what it is intended to do is to make it very clear that the decision as to whether or not a grievance is successful includes the financial determination.

If we do this that will be a clear signal to the authorities, whether they be within the Treasury Board or wherever, that this is intended to be carried out. It seems that we have trouble, and we've seen other examples of this. We've seen it in the case of strong recommendations made four or five years ago to try to ensure that individuals who are reservists who are subject to insurance policies receive the same benefits as regular force members in the case of dismemberment, or other particulars of the insurance policy. That seemed to take four, five, or six years to try to resolve. Then finally when political pressure mounted in the House of Commons, the Minister of Defence was essentially indicating this was a Treasury Board problem not a defence problem.

If we can solve the defence problem here by saying we want to make it clear: the Chief of the Defence Staff who has the final authority, and that's the clear intention of the act...that includes financial matters. So there ought not to be, and as Colonel Gibson says maybe another department in JAG doesn't advise it... if it's a clear direction in legislation that the CDS makes the final decision on financial matters, it's not a lawyer advising the CDS, it's not a lawyer in the justice department, it's not somebody other than the CDS who makes the decision. That's the importance of this here.

It may be that the *ex gratia* order in council can be used for the actual mechanism for granting the money. I didn't get that level of confidence from the Vice CDS when he was here talking about it. We didn't get any indication that it had even been used to pass out money. So the mechanism should be found. This may not be adequate to do all the steps, but certainly in terms of decision-making there's no other layer. There is no somebody in the justice department who has to approve the fact that this person won their grievance and they're entitled to the money. They are entitled to the money. Somebody then has to find a way to get it to them.

We're here on the committee. We're lay people when it comes to the bureaucracy and how it works. Things go on in the bureaucracy that I'm sure amaze everybody in this room, particularly those who have more familiarity with the bureaucracy than I have. We're here as makers of legislation on behalf of the people of Canada. It seems to me to be a simple matter that we can say the decision-making, including on financial matters, is going to be made at the end of the day by the Chief of the Defence Staff, and it's up to the bureaucracy to find a way to give effect to it.

I think that's the purpose of this amendment so that it's crystal clear that once the grievance is over and the Chief of the Defence Staff signs off on it that there's no other process, some mystery process, that decides whether you actually get paid. There may need to be a mechanism but we're not making mechanisms here we're passing legislation. So I think if we can make it crystal clear in this proposed amendment to clause 6 then the detail as to how that happens can and should follow. If it requires another order in council I think we can expect the government to follow through on it. If it requires some other mechanism I think we can expect, or should expect, and have the right to expect that's going to happen. It's less likely to happen if we don't take this step.

● (1615)

The Chair: Thank you.

Are there other comments?

I'll just say that one of the reasons we decided, in C-41, that this amendment was inadmissible, was that since the clause deals with “all matters” with the Chief of the Defence Staff dealing with a grievance, that already included financial matters. They are already considered because financial matters are “all matters”.

Seeing no other comments, shall NDP-5, reference number 5944209, carry?

(Amendment negatived)

The Chair: We're back to clause 6.

(Clause 6 agreed to on division)

(On Clause 7)

The Chair: This is NDP-6, reference no. 5993813.

Mr. Harris, can you move that amendment?

Mr. Jack Harris: I'm looking at that. That's an amendment that's consequential to the amendment that was just defeated.

That being the case, sir, the consequential amendment would be withdrawn.

The Chair: Okay. You're withdrawing it.

Are there any other comments on clause 7, page 5 of the bill?

(Clause 7 agreed to on division)

(On Clause 8)

The Chair: You have an amendment, NDP-7. That's reference number 5996305.

Mr. Harris, can you please move your amendment to the floor?

This is clause 8 that we're considering.

Mr. Jack Harris: Sir, I think that's a consequential amendment too.

The Chair: Are you going to withdraw?

Mr. Jack Harris: I withdraw the amendment.

The Chair: Then that takes us to NDP-8, which is reference number 5996083, from Mr. Harris.

Do you wish to move that one to the floor?

Mr. Jack Harris: That says, “provide, and make public without delay, reasons for his or her decision in respect”.

If we go to the section itself—I want to make sure I find the right line—line 26, on page 5—

Mr. Chris Alexander: It's also consequential.

Mr. Jack Harris: No, it's not.

The Chief of the Defence Staff, according to the amendment, is required to provide reasons for his decision with respect to the grievance if they don't act on the finding of the grievances committee. The intention would be to make the reason public, if the Chief of the Defence Staff were going against the decision with respect to the grievance or if the grievance was submitted by a military judge.

Again, this is to provide transparency. We did ask that the Chief of the Defence Staff not hear grievances by military judges. We lost that debate in this committee, but despite that we think there ought to be greater transparency. If a military judge is being denied a grievance, or if the chief of defence is ruling against a finding of the grievances committee, it ought to be a public thing as opposed to something that's done behind closed doors.

● (1620)

The Chair: Mr. Alexander and then Mr. McKay.

Mr. Chris Alexander: I have to disagree with both my colleagues opposite. There is an aspect of this proposed amendment as it is currently worded that is consequential on an amendment that was defeated earlier. The amendment reads, “if the Chief of the Defence Staff does not act on a finding or a recommendation of the Grievances Committee”. We have just agreed, and voted to recognize the fact, that the CDS is the final authority for a grievance—

The Chair: Are you on the right amendment?

Mr. Chris Alexander: I'm on 5996083, which is all about making public—

Mr. Jack Harris: The only addition is “make public without delay”. The effect is really just to add “and make public without delay”. The reason it takes two lines is because—

The Chair: —it jumbles up the lines.

Mr. Jack Harris: Yes, it jumbles—

The Chair: I'll let Mr. Alexander look at that.

Mr. McKay.

Hon. John McKay: I support this amendment for the simple reason that any adjudicator who is worth his or her salt should be able to make a reasoned decision, and should be able to withstand public scrutiny of that decision and should be able to set forth the facts, and the law, and the rationale for the decision.

I see no good reason for keeping anything private unless there is some compelling public policy reason, and I would dare say that most grievances have no compelling public policy reason for keeping them out of the sight of the public.

The additional reason that I would support the amendment is that it provides a body of precedent. Any adjudicator wants to look at how his or her colleagues have made similar decisions on similar fact situations over time. If, in fact, there is no basis on which these kinds of decisions are made public, then there is no basis for developing, if you will, a body of jurisprudence. If there is no body of jurisprudence then there is built-in inconsistency in decision-making, so individual A will make a decision, and on a similar set of facts decision-maker B will make a completely opposite decision.

It's good for the adjudicator, it's certainly good for the soldiers, and it's good for the public to see the basis for these kinds of decisions, what facts are accepted, what facts are not accepted, what decision is made, the rationale for the decision, and ultimately being able to defend the decision in public.

The Chair: Mr. Alexander.

Mr. Chris Alexander: Chair, there is no current requirement and there is no acceptable rationale for making public the reasons for decisions in every grievance. There are far-reaching privacy considerations that govern a large number of grievances, and by requiring the Chief of the Defence Staff to make public reasons for the decision in each one of the cases outlined in this amendment we would be placing that person in an irresolvable and impossible position with respect to the privacy rights of people, which are protected by robust legislation in this country, or in respect of the amended National Defence Act.

For that reason, we're opposed to the amendment.

The Chair: I have Mr. Harris and then Mr. McKay.

Mr. Jack Harris: I'm surprised to hear Mr. Alexander say a large number of grievances are affected by this. We're talking about the Chief of the Defence Staff overruling the grievance board. I wouldn't say that happens a hell of a lot of the time, to be honest with you.

But it's important to know that when we have what we're now going to be calling the external review board, it is designed to provide external independent determination of a grievance of a Canadian Forces member. To go through this whole process of having the grievance determined by an external review board after being denied through the chain of command, suppose that person wins at the external review board and the CDS says no. Isn't the requirement of reason by itself not enough if the reasons only go to the griever?

But there is a public interest in knowing whether or not, and why, something that has gone so far as to be adopted by the external review board for the purpose of ensuring independence is now being overturned. There is a right to know there.

As for the second consideration on the other side—the grievance being submitted by a military judge—it's clearly in the interest of transparency to know what the outcome is when the CDS is making a decision with respect to a military judge. Any interference with the privacy of the military judge who is involved is overridden by the necessity of ensuring the public and the members of the military community in particular know of the independence of military judges.

This might be the provision that would save the issue of independence of the judges if there is publicity and transparency with respect to how the CDS deals with grievances, that it is not being done behind closed doors. If it's something that would clearly not be deemed by a court to interfere with independence, you'd then know that because you'd know what the decision was, it would be publicly available, and it would be part of whatever challenge went to the court.

These things go to court because someone is dissatisfied with the decision made by a particular tribunal, or sometimes in advance of the tribunal even hearing it. That was the case with one or two matters before a court martial. The independence of the judges was a challenge to the process.

I think we should do whatever we can to ensure transparency there. Even if you don't agree with me in terms of the Chief of the Defence Staff not making decisions on a military judge, by adding these five words “and make public without delay” the reasons for a decision with respect to overruling a finding of the grievances committee or one of the military judge, I think we would be assisting the process.

● (1625)

The Chair: Mr. McKay.

Hon. John McKay: The CDS is in fact the final court of appeal here for pretty well all these purposes. The reason you have decisions released in public is to avoid both arbitrariness and the appearance of arbitrariness.

If the CDS cannot defend his reasoning or does not accept a certain set of facts or has skirted around a certain set of facts, the decision is almost inevitably going to be flawed. If a decision is flawed, that will lead to a distrust of the system and it will affect morale. I think it should be public unless there is some compelling reason why not.

With respect to Mr. Alexander's argument about privacy, etc., it seems to me that the privacy call is on the griever. If the griever does not wish the decision to be released in public, then I think that's his or her prerogative, not the other way around. If in fact there is some compelling national security reason, which I can't fathom or imagine, I'm sure the CDS will find ways in which it's not put out in public.

But the rule should be that everything is in public unless there is a compelling reason otherwise.

The Chair: Other comments?

Seeing none, now we're dealing with amendment NDP-8, reference number 5996083.

(Amendment negatived)

The Chair: Now we go to amendment NDP-9.

Mr. Harris, can you move your amendment, reference number 5995955?

● (1630)

Mr. Jack Harris: I'm being advised that's consequential, and we will withdraw it as it relates to the CDS authority.

The Chair: Okay. So we're back to clause 8, unamended. Are there any final comments on clause 8?

(Clause 8 agreed to on division)

The Chair: Moving on, clause 9 on page 5. We have amendment NDP-10, reference number 5993931.

Mr. Harris, could you move it to the floor, please?

Mr. Jack Harris: I move amendment NDP-10. It's an amendment to clause 9 on page 5—

The Chair: The top of page 6, actually.

Mr. Jack Harris: After line 44 on page 5—

The Chair: It's the last line, it will just continue on.

Mr. Jack Harris: Okay, what have we got here?

The Chair: It would add to the bottom of page 5.

Mr. Jack Harris: Okay. All right, it was *a*, *b*, and *c*, so that the provision would now read:

> 29.14 (1) The Chief of the Defence Staff may delegate any of his or her powers, duties or functions as final authority in the grievance process to an officer who is directly responsible to the Chief of the Defence Staff, except that
>
> (a) a grievance submitted by an officer may be delegated only to an officer of equal or higher rank; and
>
> (b) a grievance submitted by a military judge may not be delegated.

We've added *c*:

> (c) a grievance that has far-reaching implications for the Canadian Forces may not be delegated.

I think that's designed because we have a little problem with delegating this final authority in any event, although the argument has clearly been made that there are reasons for doing this—although we don't necessarily agree with them—in terms of getting advice and having a study done and all of that. Certainly when we made this argument the last time, and we made it again, that the CDS at the end of the day is the one who, if he has the final authority for grievances, including military judges.... It's a morale issue. The notion that the buck stops here is one that I think we've had exemplary holders of the office of CDS make a very important part of their mandate and their persona. I can refer, of course, to the most recent CDS, Walter Natynczyk, who prided himself on his personal relationship with, and sense of responsibility to, all the members of the forces. The notion that the final authority rests with the CDS is a part of this and that's why we support that notion, despite our concerns, except with respect to military judges.

However, we think that if we're going to change this—and it looks as if the government is determined to change this—we should include an exception for grievances that have far-reaching implications for the Canadian Forces. That's a judgment call, clearly, and it's a judgment call that we expect the Chief of the Defence Staff to use wisely. But the indication should be that this delegation ought not to be used without the kind of consideration of the implications of a particular grievance so that the CDS keeps to himself or herself—although we've never had a female CDS yet—the final resolution of any grievance that has far-reaching implications for the Canadian Forces.

The Chair: Okay.

Mr. Alexander.

Mr. Chris Alexander: The CDS retains the option not to delegate, and the function of delegating grievances is protected both in terms of the rank of the person to whom the authority can be delegated and in that, should the situation arise where a military judge has a grievance, the CDS must retain the direct responsibility for that grievance.

We will oppose this amendment simply because the term “far-reaching implications” is vague. Who would determine which grievance has far-reaching implications? It's not a self-defining category of issues. We do find that the current specification of certain types of grievances with systemic implications that exist in the Queen's Regulations and Orders 7.12 is a sufficient safeguard of the CDS's responsibility to retain responsibility for grievances that could impact the entire institution. But it's laid out in a more precise way there, and we think properly in the QR and O because those regulations can be changed by order in council.

● (1635)

The Chair: Mr. McKay.

Hon. John McKay: As reluctant as I am, I agree with Mr. Alexander. I know it's shocking.

One, he's right on the point that “far-reaching implications” is not a precisely defined term in law, and we prefer precision over non-precision; and two, I think it mines too far into what is ultimately a CDS discretion. He or she is the CDS for good reason. At some point or another you cannot regulate, by legislation or otherwise, that decision-making process.

As reluctant as I am, I don't think this amendment should pass.

The Chair: Mr. Harris.

Mr. Jack Harris: I'm sorry to hear the comments of my friend. I guess I'll call you both learned friends—learned in different spheres.

I can only rely on the people who seem to be heroes for the other side when it suits their arguments, but who are ignored when it doesn't. Mr. Justice Lamer, who has been praised fulsomely by the opposition when they agree with what he says, is being ignored in this case. Mr. Justice LeSage, who is also fulsomely praised—

An hon member: Not by the government.

Mr. Jack Harris: Well, I've heard the learned gentleman from the JAG praise the opinion of Mr. Justice LeSage and Mr. Justice Lamer on behalf of the government. As you told us, they were speaking on behalf of the government, so we take them at their word.

Mr. Justice LeSage's recommendation 41 was, “The CDS should be permitted to delegate his role as the final adjudicator in all but those cases that have far-reaching implications for the Canadian Forces”. That's where the choice of words comes from: a retired justice of the court. Although the words may be imprecise, their intention is very clear.

Mr. Justice Lamer, in his report, recommended that, “the Chief of Defence Staff be given authority to delegate...the powers, duties or functions...as final authority in the grievance process”.

He said:

> Notwithstanding the above, I recommend that the officer to whom the Chief of Defence Staff delegates be required to submit to the Chief of Defence Staff for final adjudication all grievances that fall within guidelines to be established by the Chief of Defence Staff (e.g., grievances that have policy implications for the Canadian Forces, affect the capacity of the Canadian Forces, and/or have significant financial implications).

These are examples, I would submit, of grievances that would have far-reaching implications. Mr. Justice Lamer suggests that the final adjudication of these grievances be retained by the Chief of the Defence Staff. That's where the argument comes from. That's where the suggestion comes from.

We had a philosophical notion that the Chief of the Defence Staff should not be disengaged from the grievance system because that's where you find out where the bugs are. You find out when things aren't working when people file grievances. If you have 500 grievances on a particular topic, you might get the hint there's something serious going on in a particular area or field, or potentially in a particular command. This is the way for the Chief of the Defence Staff to be seen to be personally interested and aware of what's causing disgruntlement in the system.

We have a grievance system that has its warts. Improvements have been called for, and some have been made. To permit a wholesale delegation of the powers of the Chief of the Defence Staff, having jealously guarded them, which we just did when we tried to give the military judges some independence.... Now we're saying they're going to be jealously guarded by the CDS with the final authority, but he can delegate it in this manner, without any significant controls on that power, other than saying a military judge's grievance can't be delegated, or if an officer grieves it can't be delegated to someone of lesser rank. Well, these are two modest limitations.

I submit the integrity of the authority and role of the CDS would require that all of these grievances that end up, using LeSage's words, “having far-reaching implications to the Canadian Forces”, to in fact be personally determined. At the end of the day, I don't mind having somebody else do the work. As Mr. Justice Lamer recommended, you could delegate the work, but it has to come back to the Chief of the Defence Staff for final adjudication so it's not actually a delegation of the final authority.

● (1640)

Having said that and relying on the independent reviews that this government has asked for and paid for and sought from the highest authority, then I think we should honour those suggestions and recommendations and ensure that grievances that have significant implications for the capacity of the Canadian Forces, significant financial implications, significant policy implications, be determined by the Chief of the Defence Staff and not by some delegation.

The Chair: Are there other comments on the amendment?

(Amendment negatived)

The Chair: We're on clause 9.

Any other comments on clause 9?

(Clause 9 agreed to on division)

The Chair: Clause 9.1, which is a new clause that's been proposed by the NDP, is NDP-11, reference number 5944194. I'm going to rule this inadmissible as it infringes on the financial initiative of the crown and imposes a charge on the public treasury in the instance the charge on the treasury be cost awarded by the Federal Court to the applicant in a grievance action.

As you see, that is determined specifically in clause 3 where they talk about costs on a solicitor-client basis. That's inadmissible.

Mr. Jack Harris: We anticipated that, sir.

So reference number 5996242, NDP-12 leaves out that particular clause. There's one subsection there, subsection 29(3) and—

The Chair: Now that would create a new clause as well. You're talking about NDP-12?

Mr. Jack Harris: NDP-12 amended by adding a clause.

The Chair: After section 29.15.

So would you withdraw that one then?

Mr. Jack Harris: No, the first one is withdrawn.

The Chair: So NDP-12 is still in order?

Mr. Jack Harris: NDP-11 is withdrawn or ruled out of order. NDP-12—

The Chair: Is still admissible or creating a new clause.

Mr. Jack Harris: That's creating a new clause 9.1.

The Chair: If you wish to move that to the floor you may.

Mr. Jack Harris: We're moving NDP-12 now.

The Chair: That's reference number 5996242 for those who are following on that basis.

Mr. Harris, the floor is yours.

Mr. Jack Harris: I'll take the floor in a second.

This is essentially to ensure that the grievance process operates properly. The complaint has been—and we've seen this, we've heard this before, we've heard it again—that the process has been changed to the extent that grievances are now being dealt with in a more timely fashion, but we still have people waiting two and three years to get their grievances heard.

This provides a remedy essentially that if somebody's grievance has gone more than 12 months there's no automatic finding of the grievance in his favour or anything like that. It simply allows them to go to court and ask for an order that something be done. It could be 30 days, 60 days, six months, but it at least allows an individual who has a grievance that's been outstanding for 12 months—and the limit is set here—that it should be dealt with within 12 months.

If it doesn't happen then a person can go to the Federal Court and say they have a grievance that hasn't been dealt with and would like a resolution. It would at least require the authorities to either provide an answer or tell the court why the matter couldn't have been resolved in the 12-month period and indicate the circumstance and situation and the judge would then determine an appropriate remedy.

Obviously the desire would be to have some enforceable mechanism that says 12 months is enough to deal with a grievance. If you can't deal with it then, the court will decide how quickly you should deal with it.

● (1645)

The Chair: Mr. Alexander.

Mr. Chris Alexander: We think the amendment goes beyond the scope of the bill as passed at second reading.

But more importantly, Mr. Chair, this is not the right place to enshrine time limits for grievances. They should be governed by regulation. They should be governed, as is often the case, by more flexible means than legislation. And that is the case right now.

There are service standards. There are impressive efforts under way to overcome the grievance backlog. As Mr. Harris himself has said, there's been progress made on that front.

But there are cases, grievances of sufficient gravity, where more than 12 months is required. And that has been the case in the past.

I would challenge any member of our committee to argue that there have not been cases of a complexity that would have required occasionally, from time to time, more than 12 months. We would hate to see the ability of the grievances committee to do its job effectively, to look at all aspects, to allow for due process in a very complex case, fettered by an arbitrary time limitation of 12 months in the legislation.

The Chair: Mr. McKay.

Hon. John McKay: Normally I would not support this kind of an amendment, and analogizing to a civil system or a non-military system I think the 12 months would be quite arbitrary. But in this particular case I support it, only because the military is a closed culture.

One of the things that kills morale faster than anything else is an outstanding grievance. If, in fact, on the one hand you have to have a system that is not dealing with problems as the grievers think they should be dealt with, you're going to get all kinds of collateral damage, which I don't think is necessary or desirable.

My thought on this is that if you don't send up a red flag, then no one will salute it. So in this particular case, because it is a military culture, I think it should be dealt with expeditiously. I don't know that you can leave it to just guidelines.

The Chair: Mr. Harris.

Mr. Jack Harris: At the risk of wearing out yet another microphone, I'll add my further comments.

I thank Mr. McKay for his support.

Once again, Mr. Chair and colleagues across the way, the notion there's a problem with the grievance system didn't fall out of the sky. The former Chief Justice of the Supreme Court of Canada was given the task 10 years ago in 2003 to look into these matters, and he had a recommendation, number 74:

> I recommend that going forward, there be a time limit of 12 months for a decision respecting a grievance from the date that a grievance is submitted to a commanding officer to the date of a decision by the Chief of Defence Staff or his delegate (under my proposed modified grievance system). This 12 month time limit would apply to all grievances, excepting those that must be personally adjudicated by the Chief of Defence Staff because they fall within the guidelines to be established by the Chief of Defence Staff.

This hasn't happened either.

> If the one year time limit is not met, subject to the exception for grievances that the Chief of Defence Staff must personally adjudicate, a grievor should be entitled to apply to the Federal Court for such relief as that court may deem appropriate.

The exact words we're using here.

> The grievor should also be entitled to his/her costs on a solicitor client basis, regardless of the outcome of the case.

Why would Chief Justice Lamer put that extraordinary remedy there, that particular part of which has been ruled out of order because of the need for a royal recommendation?

Okay. We accept that. If a royal recommendation is not forthcoming, it's not forthcoming. But why did Chief Justice Lamer put that in? You don't get your costs on a solicitor client basis unless you shouldn't have been in court in the first place, and the judge decides you shouldn't have to be there because you should have your matter decided.

Chief Justice Lamer saw that the system was so egregious to grievers who were trying to get their thing solved that he wanted to have this extraordinary remedy there.

Yes, there has been progress. Why? Because it's been so bloody embarrassing to the government and so necessary to try to come to a solution that efforts have been made and enough public and private complaints have been made about it, enough awareness of the morale problems caused to the ordinary enlisted men and women who try to serve this country to the best of their ability with bravery and sacrifice and all the things we're so proud of, that these people deserve, Chief Justice Lamer said, to have their grievances resolved in a reasonable period of time, which he said was 12 months.

If we can't put that into legislation and say that's a reasonable expectation for the men and women who join our forces, who serve their country, who risk their lives, who do all the things we ask of them, and they are put in a justice system that we have heard is for good reasons harsher than the civilian justice system, and we have all those legal parameters around them to control them, to discipline them, to make a cohesive force so they will do the job we ask of them, surely there's another side to this.

Surely there has to be a bargain here of some kind, a social bargain, a responsibility that okay, we're going to do this to you, we're going to expect you to obey orders without question, do the job we ask you to do, risk your lives, take it on the chin and do all this, but if you have a grievance, we're going to resolve it in 12 months one way or the other. You're not going to win them all. You might not like the result, but we'll have a result for you in 12 months. If we don't, you can knock on the door of a judge of the Federal Court, and he can make whatever order is deemed appropriate.

They don't make orders willy-nilly. They are not going to decide the grievance. They are going to make an order that it be dealt with. They are going to ask questions. And maybe the mere fact that this authority is here will speed up some matters that might be proceeding a little less quickly than they should.

It's not necessarily because matters are so complex they can't be dealt with in a year. We have our limitations here. You have to lay a charge within six months on a summary trial, and you have to be over with it in 12 months. These are hard numbers.

● (1650)

What's wrong with a hard number on a grievance? If there's a problem, then a judge is going to make an appropriate order. Go to the court. Convince the court that this is so complex it couldn't be dealt with within a year. But don't go to court and say, well, it was on the back burner along with 50 other recommendations because the guy who was supposed to deal with it had an accident and we didn't get around to replacing him. That's not a good reason.

If we're going to be taking this grievance procedure seriously and we're going to follow Mr. Justice Lamer's recommendation, which was made some many years ago now.... Let's assume that it might have caused some hardship five or six years ago. Whatever the circumstances were then, they're much better now. We're agreeing that some progress has been made. I don't know where we are; we haven't received any numbers. We're hearing vague generalities from the other side.

Justice Lamer could say when he made his report that 12 months was reasonable and facts should be put into law. And to the point that failure to deal with it would give an individual the right to go to Federal Court and get the military to pay for his lawyer, that's what it says. Getting your costs on a solicitor-client basis means that you hire a lawyer, go to court, and you will get an award from the judge that says “he shall”. That's what the recommendation was: the griever should be entitled to his cost on a solicitor-client basis regardless of the outcome of the case.

That was a pretty strong recommendation from Chief Justice Lamer, who wanted to ensure the military was going to take this process seriously. The hope would be that no one would ever go to court because that prohibition and that remedy would be enough to ensure grievances would be dealt with in a timely fashion. If that meant hiring more people or assigning more people to the role of resolving grievances, so be it.

What Chief Justice Lamer was saying was to put the resources in place: treat these things seriously; don't let them languish, and resolve them. That's all he was saying. We're not saying resolve them in favour of the griever. We're not saying that the grievers are always right because obviously they're not.

A grievance is simply a disagreement about whether you're entitled to a certain benefit or whether a certain rule applies or doesn't apply to you. These are sometimes complex matters, but that's what the grievance process is for. That's what the people are there to deal with. That's why they're assigned. That's why they have legal advice. That's why they have people with experience who can deal with these things. And there's no reason they can't be dealt with. Justice Lamer certainly felt there was no reason that they couldn't be dealt with within 12 months. He not only felt there was no reason, but that in fact it was an imperative for the purposes of maintaining morale and doing justice to the claims of individuals who have no right of representation.

You know, we put people in the military. People join the military. We had a dean of a law school who said you go into the military and you sign away certain rights. He went so far as to suggest that you sign away your charter rights. I don't think you do that. I don't think anybody signs away their charter rights in this country. I disagree with him on that.

One of the things you don't have access to in the military is a union. I practised law for 30 years, and I represented a lot of unions. I know how it works. You have the collective agreement. You have the right to a grievance process. It's in the control of the parties to decide who's going to be on an arbitration board. If you win your case, you can go to court and get it enforced if the employer doesn't pay. There is a process that ensures you can get your grievance heard and that you're going to get paid.

Now, we've just decided that we're not going to send a clear message that the CDS doesn't have the final authority. We didn't do that. We know we have a problem with that. We haven't solved it. We know we have a problem with grievances not being heard. We've had it since Justice Lamer made his recommendation. Can't we do something? Can we say to the men and women in uniform who work in the forces that if you have a grievance it's going to be resolved in 12 months, and if it's not, you can call us out on it?

It's essentially saying you have a right that it be resolved in 12 months. You don't have a union. You don't have the right to have a union. You can't collectively bargain. You can't go on strike. You can't withdraw your services. You have to obey your senior officers and all of that. But if you have a grievance, we're going to deal with it in 12 months. If we don't, then you can go to court and the judge will decide whether we're being reasonable and he can make whatever order is appropriate.

I don't think that's too much to ask for the people in the forces who are giving up the right to bargain collectively and do all those things that other citizens have the right to do.

● (1655)

The Chair: Other comments? Seeing none, we're going to vote on NDP-12, reference number 5996242.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: We move on to clause 10, which is the addition of a title in the bill, Military Grievances External Review Committee.

Are there any comments on that? I see none.

It's just the title.

● (1700)

Mr. Jack Harris: I do have some comments on that. I'm going to vote in favour of it because I do believe we should have an external review committee. But I have some serious misgivings about whether or not we're creating one. I don't know how favourably my amendments are going to be considered. I have a feeling they're not going to be considered very favourably.

We've got provision here for serving members of the Canadian Forces to be part of the grievances committee, but that doesn't strike me as an external review committee. We're changing the name, and one of the recommendations in relation to this had to do with the creation of an external review committee, and we're giving it that name. We're giving it that name here but are we creating an external review committee or are we naming the existing committee that has provision for active CF members being part of that committee—contrary to the recommendation of LeSage and others, including the current chair of the grievance board—to call it the external review committee?

The Chair: I think you're getting ahead of yourself here.

Mr. Jack Harris: I'm getting ahead of myself but we're changing the name to external review committee, but we're not creating one. I'll vote in favour of it though, Mr. Chair, because I believe we should have one.

The Chair: Okay. Shall clause 10 carry?

(Clause 10 agreed to)

The Chair: On clause 11. We have a few amendments on clause 11.

The first one up is NDP-13, reference number 5993939.

Mr. Harris, you can move it to the floor, please.

Mr. Jack Harris: This is a matter that I think is important to the operation of the committee. It ought not to be controversial, frankly. I really don't know why it's being resisted. We had some pretty compelling testimony from the chair of the grievances committee.

This is designed essentially to permit a member of the grievances committee...which now, as a result of the last section, is called the Military Grievances External Review Committee, or the grievances committee in short form.

Here's what we say:

> if a matter has been referred to the Grievances Committee and the term of appointment of a member who has been participating in the consideration of the matter expires, or the member resigns, before the Grievances Committee concludes its consideration of the matter or gives a decision, the member, solely for the purpose of the Grievances Committee's concluding its consideration of the matter...shall continue to be considered a member of the Grievances Committee, except if removed for cause.

The last four or five words were prompted by some penetrating comments by Mr. Hawn during the last round of this consideration. He expressed some dissatisfaction with the wording we had chosen.

What if some member had been removed for cause, for doing something outrageous apparently, or whatever one might do to get removed for cause from a grievance board? I guess people can do scandalous things and be removed for cause.

If you look at the last committee hearings, the discussion was that we were not really opposed, but we didn't like the wording so much. That was two years ago, in February or March of 2010. There have been two years to work on good wording. I haven't seen that come forth from the other side, but I'm forgiving. I don't blame Mr. Hawn for that. He's not the government. But the argument was that there wasn't anything particularly wrong with it except that we didn't like the wording. So we have gone out of our way to deal with the concern that was raised and to try to craft something that fits the committee.

I don't know if we had that testimony the last time, but we certainly had it this time in spades from Mr. Hamel, who said that when it comes to the end of the term, he has two or three people who can't do anything. He can't assign them a case. He has to pay them. Their workload goes down and down, and until somebody else is appointed, he can't give anyone a job.

There's another thing that is important, which we didn't get into at the committee hearing because there wasn't time. There is a strong principle of administrative law that says the only people who can participate in the decision about a case are those who have actually heard the evidence. If Mr. Chisu, Mr. Hawn, and I were the three adjudicators, we would hear all the evidence. It would go on for a year. It can do that under this provision, without a 12-month requirement. If it goes on for a year, we have a few days here and we go on, back and forth. Then we would have to write a decision. But if Mr. Chisu's term of office expires, we're back to square one, because Mr. Hawn and I can't make the decision in his absence even though we all heard the evidence. Mr. Chisu can't participate in the decision after his term expires, and we're back to square one. That is a principle of administrative law.

I have practised a fair bit of it myself. I'm not testifying as an expert, but I'm telling you that's a common principle.

So this actually ought not to be controversial. I would say not all, obviously, but most boards and tribunals across the country have provisions like this. The Labour Relations Act in Newfoundland, for example, with which I am very familiar, has one. In the Judges Act, it's pretty clear that a judge who sits and hears a case, even though he's retired because he's of mandatory retirement age, can continue as a judge for the purposes of rendering a decision.

We're just trying to do something that is efficient, in terms of saving money and ensuring that the people who are appointed to do a job and are paid to do a job are actually able to do the job up until the end of their term, and if there is a need for a person to make a decision, solely for the purpose of concluding the consideration and giving a decision, the person continue to be considered a member of the grievances committee, unless removed for cause.

● (1705)

I suspect it's a Conservative principle that people who are appointed to a job should be used, and not be idle for a while, given only a three-quarter load because they can't be assigned any more cases. That doesn't seem to jibe with common sense or the kinds of principles that would be espoused, in terms of efficiency of government or tribunals.

I'm only saying this because I haven't got a sense one way or the other from the other side yet whether they think this is acceptable. But I submit it's a quite reasonable and practical proposal that accords with common practice across the country.

The Chair: Mr. Alexander.

Mr. Chris Alexander: Thanks, Chair.

We are not persuaded by those arguments. The grievances committee should be able to manage their affairs with the number of members they have, with the workload they have, to allow for appropriate transitions after a four-year term. In fact, they have managed their affairs—I repeat for everyone's benefit—recently under the current law, with the stipulation that service not go beyond four years, in a way that has come close to eliminating the backup, certainly reduced it dramatically.

Moreover, there is provision now for new members to be paired with outgoing members to ensure the transition, and there's no reason why that kind of pairing could not take place for cases that extend beyond the term of a member. That is indeed the case in a wide variety of independent tribunals, at both the federal and the provincial levels. We see no reason to change that rule in this particular case. Therefore, I will preview our position on the next two amendments, which is that we will also oppose them, because we do not think there should be prejudice against serving or former members of the Canadian Forces with regard to their potential membership in a grievances committee. There are close to 100,000 serving regular force/reserve force members. To think that none of them is qualified enough to be impartial on a grievances committee strikes us as odd, as it does in the case of the over-600,000 veterans of the Canadian Forces.

● (1710)

The Chair: Don't get ahead of yourself. We've got to deal with those amendments.

I've got Mr. McKay, and then Mr. Harris.

Hon. John McKay: If the grievance board was handling it so well, why would Mr. Hamel come before us and say he needs this amendment? It's obviously just an administrative housekeeping type of amendment to cope with those, hopefully, very rare cases in which a set of circumstances is such that the hearing is not done before the completion of somebody's term. The rationale that the government puts forward is nonsense. It's been asked for by the grievance board, and this is a great opportunity to fill in a legislative gap that is very similar to what you find in civilian situations. All courts, even if they have mandatory retirement ages, have the ability to let a super-numerary sit past the age of retirement, in the event that a case has not been completed and to participate in the adjudication and in the writing of the reasons. So it makes perfectly good sense to me.

The Chair: Mr. Harris.

Mr. Jack Harris: Thank you, Chair.

Once again, I'm not trying to rub it in here; I'm trying to inform the opposite side, once again, that the former Chief Justice Antonio Lamer, in making his recommendations to the government, said in recommendation number 85:

> I recommend that the National Defence Act be amended to provide authority for Canadian Forces Grievance Board members whose terms have expired to complete their caseloads.

Why did he do that? Because it's common sense. It's common to judicial boards, tribunals, judges, and courts across the country. It's efficient. It's a matter of justice to the grievers not to have their cases thrown away.

We all listened to Bruno Hamel, on February 6 of this year, when he said:

> ...last fall, I was unable to assign grievances to three experienced board members during the last three months of their tenure, despite having files that needed to be reviewed.

He went on to say:

> It wouldn't be fair for a griever, a Canadian Forces member, to have a case assigned to a board member...and then suddenly this judge is no longer a judge and the case has not been decided.

You have to reassign the case and start from scratch. We're talking about fairness to the grievers who we believe should have justice.

Even though you didn't agree to the 12 months, Mr. Justice Lamer thought that we should. Now you're saying we're going to put an additional barrier in the way of potential delay. As Mr. Hamel, the chair of the grievance board, said, we have three people, but no new cases for three months when they're available, and files that need to be reviewed. I don't get it.

You hold up Chief Justice Lamer as a paragon of the law. This is a strictly legal matter. It's not that it has practical consequences. There is no ideology here, folks. Nothing bad is going to happen. There is no ideology. This is practical administration of justice in a fair way for individuals in the Canadian Forces.

I don't know what's preventing you from doing something that can provide justice to grievers by doing something that's done in so many boards and tribunals across the country. I can't understand it.

The Chair: Are there other comments?

Seeing none, I'll call the question on the amendment NDP-13, reference number 5993939.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: We have amendment NDP-14, reference number 5996306.

Would you care to move that to the floor, Mr. Harris?

● (1715)

Mr. Jack Harris: We did have a number of amendments that have been consolidated now. I'm assuming we're allowed to do that, Chair. We have two or three proposed subsections to proposed section 29.16 at the same time.

The basic provision here is proposed subsection 29.16 (2.1), "No officer or non-commissioned member may be appointed as a member of the Grievances Committee".

I think we have to remember that what's called the grievances committee is actually the external review committee. If we go back to subclause 2(6) of the bill, in the definitions section, proposed subsection 2(1) reads as follows:

> "Grievances Committee" means the Military Grievances External Review Committee continued by subsection 29.16(1)

Grievances committee, in this context, means the Military Grievances External Review Committee. We're saying that if it's an external review committee, it ought to be external to the forces.

Justice LeSage's recommendation 49 reads as follows:

> Legislation or regulation ought to provide that active CF members are not eligible to be members of the Grievance Board/Military Grievances External Review Committee. I also recommend civilians without military backgrounds be appointed to the Grievance Board/Military Grievances External Review Committee.

That's there to provide an external review, to provide an independent decision-maker. We're not talking here about military matters that have to be dealt with by active military people. We're talking about matters that would ordinarily, in civilian life, come before an arbitration board to be settled, if you're mostly complaining about benefits you're not getting, or you're complaining about your treatment by a superior. These things, because they're mostly employment-related, ought to be dealt with by people who are independent and external to the military.

We don't think people who have military backgrounds should be excluded from these boards, but if you're actively in the military, you have to be responsible to a chain of command. Maybe you can be seconded, but that doesn't mean you're outside of the chain of command. You're still inside the Canadian chain of command. You're still expecting promotion. You're still part of the group. You're not external to the military, in other words.

We have both Justice Patrick LeSage's recommendation 49 and the comments of Bruno Hamel, in his testimony on February 6.

He said:

> One of the fundamental reasons for the creation of the board was the provision of an external review to the Chief of the Defence Staff and to the Canadian Forces members who submit a grievance. Should a serving Canadian Forces member be appointed as a board member, the board's independence from the chain of command would be in jeopardy. In his report, Justice LeSage recommended that serving Canadian Forces members not be appointed as board members. I agree.

As you know, I could go on.

The Chair: Do you have any more spare mikes?

Some hon. members: Oh, oh!

Mr. Jack Harris: I'm not sure I should wear out another mike.

I'm only kidding.

Clearly this is a fundamental principle that has been stated in this committee before. We've had high authority for it. It's a reasonable provision. I haven't heard the counter-arguments.

We do hear that people should have some knowledge of the military, but that doesn't have to be current knowledge. It doesn't need to be somebody who's in the chain of command going over to the grievances board to introduce whatever thoughts or feelings or views that person has as a serving member of the military, reporting in the chain of command as somebody else, or going back to report to the same people they reported to before because they're seconded.

That's not right. It's not independent. It's not external. It's not necessary.

● (1720)

The Chair: Okay.

Are there other comments on the amendment? Seeing none, all those in favour of amendment NDP-14?

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: We're now on amendment NDP-15, reference number 5996312.

Mr. Harris, do you wish to move that to the floor, please? You're amending clause 11 by replacing lines 21 to 28 on page 6.

Mr. Jack Harris: Okay. We've just received some comments from the drafters. They suggest that a different wording needs to be used here because the reference to the subsections isn't correct. It would now read that Bill C-15 in clause 11 be amended by adding a line after line 20 on page 6 with the following.... Then the second one would be renumbered from 2.1 to 2.01. Given that, Chair, can we stand this one down and deal with it? It doesn't look like we're going to finish today, but if we can stand down, I'd just as soon have a proper amendment before the committee.

The Chair: Okay. I'll tell you what. We will sit NDP-15 and we will stand clause 11 and come back to that one at the end of our consideration.

Is that agreed?

Some hon. members: Agreed.

(Clause 11 allowed to stand)

The Chair: We're moving on to clause 12 on page 7 of Bill C-15. Are there comments? No amendments have been tabled.

Hon. John McKay: Why don't we group them all?

The Chair: I take that recommendation. Mr. McKay is suggesting that we group clauses 12 to 23.

An hon. member: No.

The Chair: We don't have concurrence.

(Clause 12 agreed to on division)

(Clause 13 agreed to)

(On clause 14)

The Chair: Are there any comments on clause 14?

Mr. Jack Harris: Yes.

The Chair: Mr. Harris.

Mr. Jack Harris: I have a question for Colonel Gibson or others who can help us out.

This refers to being “discharged absolutely or on conditions”. Now, we don't have conditional discharge in our military, so is that for some other court in another country or foreign state? Foreign states may have absolute or conditional discharge. We only have absolute. Am I right about that?

What I'm talking about here is that there's a reference to being discharged “on conditions”. Can you give us an explanation?

The Chair: Colonel?

Col Michael R. Gibson: Yes, Mr. Chair.

What that provision applies to is section 66 of the NDA, which deals with “Plea in Bar of Trial” and the defences of *autrefois acquit* and *autrefois convict*. In other words, in layman's terms, you can't be charged or tried again for something you've already been convicted of or dealt with.

That is meant to embrace convictions or acquittals not only within the military system but in the civilian system, so as to provide a protection against double jeopardy. That's why there's a reference to being discharged conditionally. If you had been dealt with in the civilian justice system for essentially that same offence, the matter had been dealt with, and you received a conditional discharge, then you could plead *autrefois acquit* or *autrefois convict*, depending on what it was.

In other words, what is being changed here, so the committee is aware, is that we're just adding absolute discharge to that list, essentially.

Mr. Jack Harris: Okay. So it doesn't just refer to foreign tribunals; that's an “or” there. If somebody were found guilty but not convicted, that's what the absolute discharge is—

Col Michael R. Gibson: Yes.

Mr. Jack Harris: This is to avoid double jeopardy, so you have to say “conditional discharge”, because someone could have received a conditional discharge in a civil court, a civilian court, and if someone happened to be charged militarily for the same offence, they can plead that they've already...you can't go ahead.

● (1725)

Col Michael R. Gibson: That's correct, Mr. Chair.

The Chair: Thank you.

Are there any other comments or questions?

(Clauses 14 and 15 agreed to)

The Chair: On clause 16, are there any questions?

Mr. Harris.

Mr. Jack Harris: This is a technical question, I guess.

Proposed section 101.1 says:

> Every person who, without lawful excuse, fails to comply with a condition...or a condition of an undertaking...is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

I guess maybe we're jumping the gun here. It's called a conviction, but this is one of the offences, under proposed section 101.1, for which it would be deemed that there would not be a conviction, so if the amendment proposed by the government to clause 75 passed, this would not result in a criminal offence. Is that right?

Col Michael R. Gibson: Mr. Chair, the answer is sort of yes. You'll recall, of course, that what's been proposed under the proposed amended version of clause 75 is a bifurcated test. It has to be one of the enumerated offences, and those in proposed section 101.1 would be, but, secondly, it has to be under the prescribed punishment threshold. So given that amplification, I would say that the answer is yes, this particular offence in proposed subsection 101.1 would be one of the ones captured in the proposed amended version of clause 75.

Mr. Jack Harris: Even though the liability to imprisonment can be up to two years, if it's dealt with below the threshold of offences —with severe reprimands, etc.—then it would not attract criminal conviction.

Col Michael R. Gibson: Mr. Chair, that is correct, but of course you'll recall that in dealing with the objective-gravity prong of the clause 75 standards, two years is actually for the lowest objective gravity of offences prescribed in the National Defence Act, so that's essentially as low as you go.

The Chair: Are there any other comments or questions?

(Clause 16 agreed to)

The Chair: Moving on to clause 17, are there any questions or comments?

Mr. Harris.

Mr. Jack Harris: Again, this is a technical question.

With regard to “any inquiry committee established under regulations”, what's the purpose of that, Colonel? What's the purpose of the amendment here? I can see having the grievances committee, because there's a new tribunal, the external review committee. The Military Judges Inquiry Committee is a new tribunal. What do you contemplate in terms of, “any inquiry committee established under regulations”? Is that being contemplated as far as you know? Are other inquiry committees being established, or is that just there in case somebody decides to establish one?

Col Michael R. Gibson: Mr. Chair, the answer is yes and yes. It's a general provision in respect of potential future amendments to the act, but it also specifically refers to the requirement for an inquiry committee to consider removal of the director of military prosecutions, the director of defence counsel services, or the Canadian Forces provost marshal. You'll see other amendments in the bill that would establish inquiry committees, or call for them to be established under regulations for DDCS and CFPM.

Mr. Jack Harris: Thank you.

The Chair: Thank you.

Are there any other questions or comments?

(Clauses 17 to 19 inclusive agreed to)

The Chair: On clause 20, are there any comments or questions?

Mr. Harris.

Mr. Jack Harris: I have a question. I know it affects your pay, so is there any other purpose to that? I guess it's an additional punishment. It also has the effect of adding a category to the list of potential punishments by saying in addition to receiving the reprimand, or whatever it is, or detention, you will also lose at least one rank, and maybe more. Is there a purpose to that other than to take away pay, or does it have something to do with the chain of command? Can you explain that a little bit more?

● (1730)

The Chair: Colonel.

Col Michael R. Gibson: Mr. Chair, there are two comments that should be made in response to the question.

The general intent is that if a non-commissioned member is sentenced to the punishment of detention, they are reduced in rank to private for the period of the detention, and then their rank is restored. Let's take the hypothetical example of a sergeant who was sentenced to detention and reduced in rank to private. They would continue to be paid, but at the private level while they served that sentence, and once the sentence was done they'd go back to their previous rank.

What clause 20 is actually referring to is the specific case where there's an intermittent sentence, which is, you will recall, one of the new sentencing options provided for in the bill. This particular clause says “until the sentence of detention is completed”, which is meant to address the situation where you may have a person who is sentenced to detention but is serving it intermittently—over the space of several weekends, for example—just to avoid any uncertainty about what their status is during the period when they are not actually in detention.

Let's say, again, a sergeant is sentenced to detention. They serve the sentence intermittently. During the period when they are in custody, they are a private. But if there isn't a rule providing clarity, there'd be massive confusion if they showed up at the armoury in the middle of the week before they went back to serve their detention again on the weekend. What is this person's rank? What is this person's status?

So this is just meant to provide clarity. While they're undergoing intermittent sentence, they're a private throughout that period.

Mr. Jack Harris: Why would it be problematic for even the case you're talking about? Are we talking about reservists here, primarily?

Col Michael R. Gibson: Yes, primarily but not entirely.

Mr. Jack Harris: So not necessarily, but very likely that's where it would be used.

If I'm serving a detention sentence on the weekend, and I may or may not have other duties in the reserve, I'm a private. What's the problem if I'm a sergeant when I'm in the armoury? Why am I not entitled to be a sergeant? I'm not serving my detention. Is the purpose of the reduction of rank while you're in detention to keep you below the rank of someone who might be looking after you, somebody who might be guarding you, or is the purpose punishment and loss of pay? If that is the case, then your detention and the loss of pay that runs with that....

If you're sentenced to 14 days not intermittently, say, you'll lose 14 days of pay between your current rank and that of private, and that's all you'll lose. But if you're serving as a reservist and you are in detention on the weekend, and you're serving at the armoury on a Wednesday night, why do you have to be a private on a Wednesday night? You're only supposed to be a private while you are in detention and lose that. In the case of a reservist, your loss of pay would continue for more than 14 days if you had 14 days' intermittent sentence.

Wouldn't that be the case? And wouldn't that be unfairly discriminating against someone in the reserves? Perhaps you can enlighten me on that. What's the confusion if I'm a sergeant when I'm in the armoury but a private when in detention?

Col Michael R. Gibson: Mr. Chair, this is just meant to avoid what we describe as the yo-yo effect. In fact we think it would cause massive confusion in the unit if there was uncertainty about the status of that person.

Let's remember what their status is. They are an offender. They have been convicted of an offence. They have been sentenced to a custodial sentence. They are only going to be able to serve that sentence on an intermittent basis if they ask for it. So in essence they're accruing a benefit, which they get to choose, to serve that sentence on an intermittent basis.

I put it to you that it would be considered illogical and unfair by the other members of the unit if one had this yo-yo effect, that the person was a private in detention on the weekend and got to be a sergeant during the week. It would be extremely bad for morale. It would create uncertainty in the unit.

I certainly don't think it discriminates. In fact, it allows the person to make an informed choice as to which option they wish to choose, to serve intermittently for a longer period or to serve it consecutively and get it over with.

Thank you, Mr. Chair.

The Chair: Mr. McKay.

● (1735)

Hon. John McKay: Is there a parallel section for commissioned members?

Col Michael R. Gibson: Mr. Chair, commissioned officers cannot be sentenced to the punishment of detention. They can only be sentenced, in terms of custodial punishments, to the punishment of imprisonment.

In essence, the option of detention is a break that non-commissioned members get. There's a long, principled reason why, but the general theory is that if a commissioned officer commits an offence that is so great that he or she should be sentenced to a custodial sentence, it will be imprisonment, because it's likely that person isn't coming back to serve, whereas the purpose of a punishment of detention is essentially rehabilitative—to allow that person to correct the deficiency in discipline, to restore them to the standard of effectiveness they should be at, to come back in essence newly minted, and to hopefully carry on.

It's meant to be in essence a benefit for lower-ranked people, recognizing the fact that they don't have the same degree of responsibility that commissioned officers would have.

Hon. John McKay: Even on the same conviction, say drunk driving or something of that nature, a far harsher sentence applies to a commissioned officer as opposed to a non-commissioned officer?

Col Michael R. Gibson: Mr. Chair, Parliament made the choice long ago, indicating the punishment of detention isn't applicable to serving officers. If you look at the principles of sentencing that are set out in clause 62 of this bill, it's considered to be an aggravating circumstance if one commits a particular offence and one abuses one's rank. The general principle is, if you are of a more senior rank, the commission of the same offence as a person of more junior rank is inherently more serious.

Mr. Jack Harris: I have a point of order, Mr. Chair.

The Chair: You have a point of order, Mr. Harris.

Mr. Jack Harris: Can we continue this next day?

The Chair: I need a motion to adjourn. We have to agree on a motion to adjourn.

Mr. Jack Harris: I don't think we need to have a motion to adjourn.

The Chair: Yes, we do. Every committee needs a motion to adjourn.

An hon. member: I make the motion to adjourn.

Hon. John McKay: Just before you make your motion to adjourn, the supplementary estimates (C) were tabled by the President of the Treasury Board today. When can we expect to see them before this committee?

The Chair: As soon as possible, but we're in communication.

Mr. Alexander, do you have any information?

Mr. Chris Alexander: I don't, but I have a point of order, Chair.

With the indulgence of my colleagues, could we vote on clause 20 before we adjourn?

The Chair: That's what I was trying to get to, I was trying to get to—

I've got Mr. Larose, Mr. Strahl. Mr. McKay had the floor. I'd like to dispose of this, if that's not a problem.

I need a motion to adjourn.

An hon. member: I so move.

The Chair: Okay, I have a motion to adjourn.

(Motion agreed to)

The Chair: The meeting is adjourned. We're out of here.

Thank you very much, gentlemen. We'll see you on Wednesday.